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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1062

HERMAN C. HANCOCK, JR.,

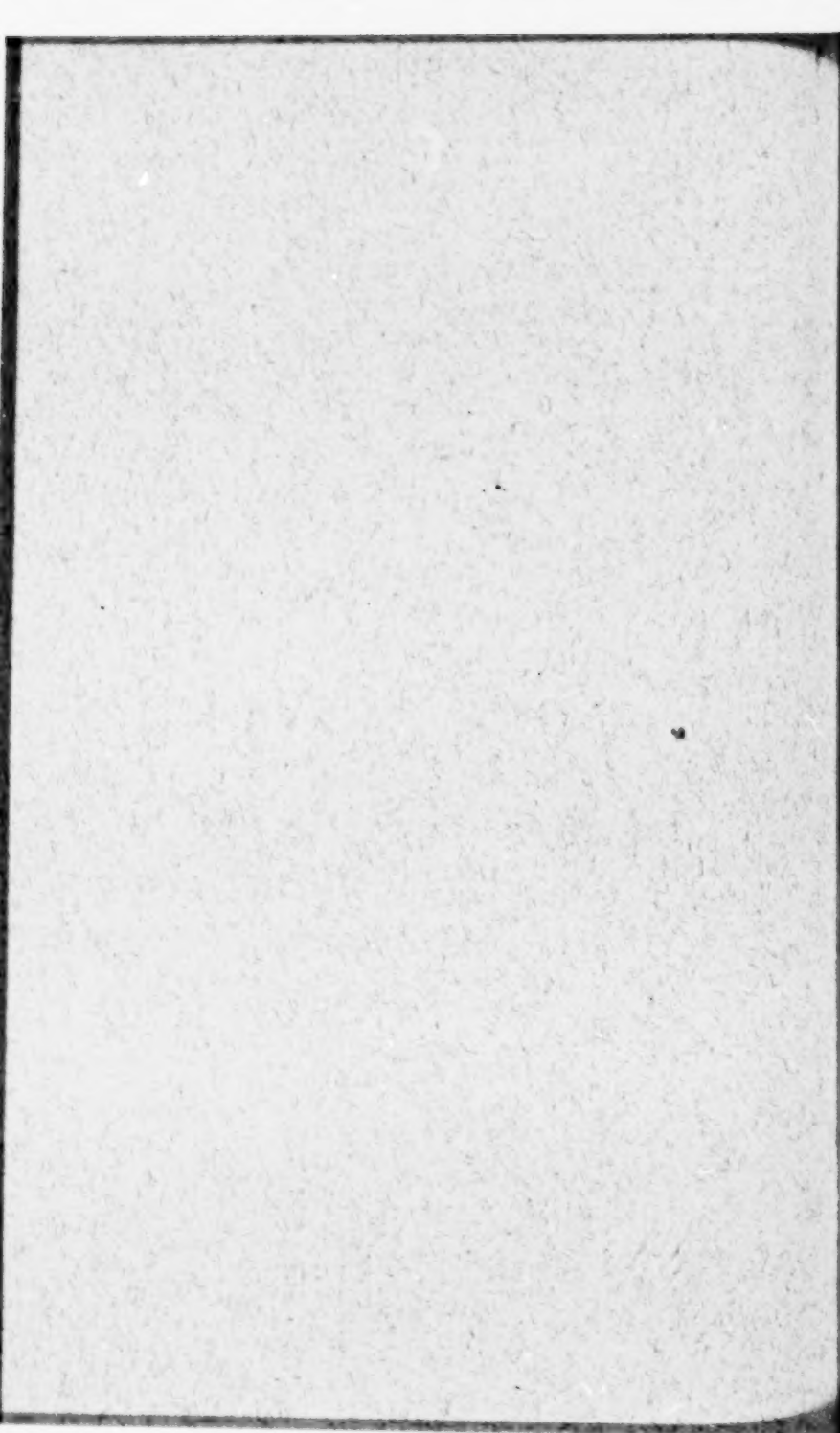
Petitioner,

vs.

**OLIVER H. STOUT, COLONEL, ARMY OF THE UNITED STATES,
AS COMMANDING OFFICER OF THE GREENVILLE ARMY AIR
BASE, GREENVILLE, SOUTH CAROLINA**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

**ALFRED F. BURGESS,
THOMAS A. WOFFORD,
*Counsel for Petitioner.***



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Petitioner,

OLIVER H. STOUT, COLONEL, ARMY OF THE UNITED STATES,
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BASE, GREENVILLE, SOUTH CAROLINA

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

The petitioner, Herman C. Hancock, Jr., prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above-entitled case on December 20, 1944, reversing a judgment of the District Court of the United States for the Western District of South Carolina sustaining a writ of habeas corpus theretofore issued by said Court in the cause and discharging the petitioner from the custody of Oliver H. Stout, Colonel, Army of the United States, as Commanding Officer of the Greenville Army Air Base, Greenville, South Carolina, under a life sentence from which he had been produced.

Opinions Below

1. An Opinion written by Hon. George Bell Timmerman, United States District Judge (R. 35), is reported in 55 F. Supp. 330.
2. The Opinion of the Circuit Court of Appeals (R. 46), is reported in 146 F. (2d) 741.

Jurisdiction

The judgment by the Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of Hon. George Bell Timmerman, United States District Judge, was entered December 20, 1944 (R. 53). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347 (a)).

Question Presented

1. The only question presented in this petition is whether a two-thirds vote of the members of a general court martial present at the time the vote is taken is sufficient to convict an accused of the crime of rape in violation of Article of War 92; or whether the concurrence of all the members of a general court martial present at the time the vote is taken is required to support such a conviction.

Statutes Involved

Articles of War 43 and 92 (41 Stat. 795 and 805; 10 U. S. C. A. 1514 and 1564) provide:

AW 43: No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these articles expressly

made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

AW 92: Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Statement

A general court martial was convened at Greenville Army Air Base, Greenville, South Carolina, on October 23, 1943, at which time the petitioner was arraigned on the charge of rape in violation of the 92nd Article of War. Upon his arraignment, the petitioner entered a plea of not guilty and upon trial was found guilty of rape as follows:

“Upon secret written ballot, three-fourths of the members present at the time the vote was taken concurring in each finding of guilty, the Court finds the accused:

“Of the Specification, Charge I: Guilty”.

Thereafter, the Court voting separately as to the sentence, sentenced the petitioner as follows:

“The Court was closed, and upon secret written ballot three-fourths of the members present at the time the vote was taken concurring, sentenced the accused:

To be dishonorably discharged from service, to forfeit all pay and allowances due or to become

due, and to be confined at hard labor for the rest of his natural life."

The record of the trial was held legally sufficient by the Board of Reviews with the concurrence of the Judge Advocate General, to support the sentence adjudged, and on April 1, 1944, the Commanding General issued and published an Order directing execution of the sentence, designating the United States Penitentiary at Atlanta, Georgia, as the place of confinement.

On April 14, 1944, the petitioner filed his petition for a writ of habeas corpus in the United States District Court for the Western District of South Carolina, which was granted. On May 26, 1944, after a full hearing, the District Court issued its Opinion sustaining the writ of habeas corpus and holding that the crime of rape (Article of War 92) requires a unanimous vote of guilty by the members of the court martial sitting at the time the vote was taken (Article of War 43); that the court martial having failed to secure the necessary votes for conviction, in effect had acquitted the petitioner of the charge of rape and that the sentence thereafter imposed was a nullity.

On June 17, 1944, the District Court issued an Order releasing the petitioner from the custody of Oliver H. Stout, Colonel and Commanding Officer of the Greenville Army Air Base, under the sentence imposed by the said court martial on the petitioner's conviction of rape.

Oliver H. Stout, respondent in the original petition for habeas corpus, thereupon appealed to the Circuit Court of Appeals for the Fourth Circuit from said judgment and Order of the District Court, and the Circuit Court of Appeals on December 20, 1944, filed its Opinion reversing the District Court.

Specifications of Error To Be Urged

The Circuit Court of Appeals erred:

1. In reversing the action of the District Court in sustaining petitioner's writ of habeas corpus and discharging petitioner from the custody of Oliver H. Stout, Colonel, Army of the United States, as Commanding Officer of the Greenville Army Air Base, Greenville, South Carolina.

2. In holding that a two-thirds vote of the members of a general court martial present at the time the vote is taken is sufficient, under Article of War 43, to convict an accused of the crime of rape in violation of Article of War 92.

3. In holding that by a conviction of the crime of rape by a two-thirds vote of all of the members present, the Court could force a sentence of death or life imprisonment when the 43rd Article of War provides, among other things, that no person shall be "sentenced to life imprisonment nor to confinement for more than ten years except by concurrence of three-fourths of all of the members present at the time the vote is taken".

Reasons For Granting the Writ

1. The decision of the Court below appears to be in direct conflict with the 43rd Article of War (41 Stat. 795; 10 U. S. C. A. 1514) which provides that no person shall be convicted for an offense expressly made punishable by death except by the concurrence of all of the members of said court martial present at the time the vote is taken. The petitioner in the instant case was convicted of an offense expressly made punishable by death by a vote of only three-fourths of the members of the court present at the time the vote was taken.

2. The decision of the Court below holds in effect that a two-thirds vote of the members of a general court martial

present at the time the vote is taken is sufficient to convict an accused of the crime of rape for which there are only two possible sentences, to-wit: death or life imprisonment, when the 43rd Article of War expressly provides that no person shall be "sentenced to life imprisonment nor to confinement for more than ten years except by the concurrence of three-fourths of the members present at the time the vote is taken".

3. The provision of the 43rd Article of War that no person shall be sentenced to life imprisonment except by the concurrence of three-fourths of all of the members present at the time the vote is taken affords an illusory protection in cases of a conviction for the crime of rape or murder where, at least, life imprisonment is mandatory and where by a vote of two-thirds of the members present, at least, a life sentence is automatically imposed upon the accused.

4. The case involves a question of tremendous importance in the administration of the provisions of the 43rd and 92nd Articles of War in respect to one accused of the crime of murder or rape in time of war and tried by general court martial. There are numbers of members of the armed forces who have been charged with or tried for the offenses of murder or rape and this constitutes a test case which will determine whether or not under the 43rd Article of War a unanimous vote of the members of a general court martial is required for conviction or a mere two-thirds majority of those present at the time the vote is taken. If the decision of the lower court is allowed to stand, the petitioner and many other members of the armed forces may be convicted and sentenced to life imprisonment for rape or murder by a vote of only two-thirds of the members present when the 43rd Article of War expressly provides that no person shall be sentenced to life imprisonment or confinement for

more than ten years except by the concurrence of three-fourths of the members of the court present at the time the vote is taken.

Conclusion

For the reasons stated, the writ should issue as herein prayed.

HERMAN C. HANCOCK, JR.,
Petitioner,

March, 1945.

STATE OF SOUTH CAROLINA,
County of Greenville:

Herman C. Hancock, Jr., being duly sworn, deposes and says that he is the petitioner in the above entitled matter; that the foregoing petition is true of his own knowledge except as to the matters as therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

HERMAN C. HANCOCK, JR.

Sworn to before me this 13th day of March, 1945. Dorothy G. Carey, Notary Public for S. C. My commission expires at the pleasure of the Governor. [SEAL.]

ALFRED F. BURGESS,
THOMAS A. WOFFORD,
Counsel for Petitioner.